Supreme Court, U.S.
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No. 99-1093

IN THE

Supreme Court of the United States

JOHN REZZONICO and JACQUELYN REZZONICO,

Petitioners,

v.

H & R BLOCK, INC., H & R BLOCK EASTERN TAX SERVICES, INC., and HRB ROYALTY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF CORPORATE AFFILIATION PURSUANT TO RULE 29.6

Respondent H&R Block, Inc. is the indirect corporate parent of Respondents H&R Block Eastern Tax Services, Inc. and HRB Royalty, Inc. No other publicly held company owns 10% or more of the stock of any of the respondents.

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INTRODUCTION

The three "questions presented" by the petitioners share a fatal flaw: each is premised on a misperception or mischaracterization of the holdings below. The Second Circuit did not hold that a litigant cannot rely on the accuracy of a Rule 77(d) notice with respect to the factual information that notice is intended to convey, *i.e.* the date of entry of a judgment or order. It held that the failure to file a timely notice of appeal was not excused where a Rule 77(d) notice was accurate in that regard, but the appellants claimed that their counsel was otherwise misled as to the legal question of when their notice of appeal was due. The Second Circuit also did not hold that the law of the case doctrine does not apply to an appellate court's prior jurisdictional holdings. It held that that doctrine, which is discretionary to begin with, does not bar an appellate merits panel from reconsidering a decision by an earlier motions panel.

The Second Circuit's actual holdings are not only correct but uncontroversial. Only by severely contorting the lower court's rulings are the petitioners able to manufacture the "circuit splits" alleged in the Petition. As set forth in detail below, the petitioners' artfully crafted questions are not "presented" by this case, which involves only factbound determinations implicating no genuine circuit split. The Petition therefore does not merit this Court's review.

STATEMENT OF THE CASE

This petition arises out of an erroneous legal conclusion by the petitioners' counsel as to when the petitioners' notice of appeal was due. A Judgment against the petitioners was entered on November 26, 1997. A copy of the Judgment was

promptly sent to the petitioners along with a notice from the clerk of the district court, pursuant to Fed. R. Civ. P. 77(d), accurately advising the petitioners of the date on which the Judgment had been entered on the docket. Opposition Appendix ("Opp. App.") A at 2a. The form notice also stated that the petitioners' appeal must be filed within 30 days of the "judgment or order", *i.e.*, that their appeal had to be filed by December 29, 1997. *Id.* at 1a-2a.

On December 1, 1997, an Amended Judgment was entered. A form Rule 77(d) notice was again promptly sent to the petitioners accurately advising them of the date on which the Amended Judgment had been entered on the docket. Opp. App. B at 4a. The second form notice also stated that the petitioners had 30 days to appeal the "judgment or order," *i.e.*, that an appeal had to be filed by December 30, 1997. *Id.* at 3a-4a.

Each of the Rule 77(d) notices was accompanied by a copy of the judgment to which the notice referred: the notice of November 26, 1997 by a copy of the original Judgment of November 26, 1997, and the notice of December 1, 1997 by a copy of the Amended Judgment of December 1, 1997. Opp. App. D at 6a-7a. Thus, there could be no misunderstanding as to the "judgment or order" to which each notice referred. Moreover, the docket entry reflecting the entry of the Amended Judgment on December 1, 1997 expressly stated that the Amended Judgment had been entered to "correct clerical error." Opp. App. C at 5a.[1]

1. The word "not" had been inadvertently dropped in transcribing the district court's final order for relief into the original Judgment. Although the import of the Judgment was clear despite the error, the missing word was re-inserted in the Amended Judgment.

In an affidavit submitted to the Second Circuit by Peter Welch, the petitioners' counsel in the district court, Mr. Welch stated that "based on the second Rule 77(d) notice, *and on the nature of the change made in the Amended Judgment*" (emphasis added), he concluded that the petitioners' motion for a new trial was required to be filed within 10 days of the December 1, 1997 Amended Judgment, rather than within 10 days of the November 26, 1997 underlying Judgment. Opp. App. D at 7a. The Rule 77(d) notice accompanying the December 1, 1997 Amended Judgment made no reference to the time within which the petitioners were required to file a Rule 59 motion. Opp. App. B.

On December 15, 1997, more than 10 days after the November 26 Judgment, the petitioners filed two motions, one for reconsideration of the district court's "Judgment Order" and the second for a new trial.[2] On December 16, 1997, the district court denied both of those motions. The district court's order stated that the motion for reconsideration was denied as untimely because it was, in essence, a motion to reconsider the court's grant of summary judgment, which had been entered eight months earlier. The motion for a new trial was simply marked "denied."

On December 17, 1997, one of Mr. Welch's associates called the deputy clerk of the district court to inquire about the status of the petitioners' motions. She was advised that both had been denied. She claims she was also told that the motion for reconsideration was denied as untimely, and that the judge considered the motion for a new trial timely but

2. Since the district court had granted summary judgment on all claims in the matter, there had been no trial. It is therefore unclear to what the petitioners' motion for a "new trial" referred.

had denied it on the merits. Pet. at 2-3. The associate then asked that the full text of both orders be read to her over the telephone so that she could "be certain," and the deputy clerk read the orders as requested. Pet. at 3. The petitioners filed their notice of appeal on January 13, 1998, well over 30 days after the entry of Judgment on November 26, 1997.

The respondents moved to dismiss the appeal on the grounds that (1) the entry of an Amended Judgment to correct a clerical error did not restart the time for the petitioners to file a notice of appeal going to the merits of the underlying Judgment or their time to file a Rule 59 motion, (2) the petitioners' Rule 59 motion was therefore untimely, and (3) the petitioners' notice of appeal was therefore likewise untimely.

A motions panel of the Second Circuit denied the motion. Second Circuit motions procedures do not provide for the filing of reply briefs. Second Circuit Local Rule 27. Although the respondents filed a motion for leave to file a reply brief (along with a copy of their proposed brief), that motion was not granted until the morning of argument of the motion. The parties were allotted a total of five minutes, divided equally, to argue the motion. The motion was denied from the bench, without opinion.

The parties then briefed the case on the merits. In response to the jurisdictional statement contained in the petitioners' brief on the merits, the respondents again briefed the untimeliness of the notice of appeal and suggested that the court lacked jurisdiction. After oral argument before the merits panel, which was devoted almost entirely to the jurisdictional issue, the merits panel dismissed the appeal for lack of jurisdiction.

REASONS FOR DENYING THE WRIT

1. This Case Does Not Present A Split In The Circuits On Whether A Litigant Can Rely On A Notice Pursuant To Fed. R. Civ. P. 77(d), And The Issue Addressed Below Does Not Warrant This Court's Consideration.

The petitioners' argument that this case creates a split in the circuits regarding whether parties may properly rely on a Rule 77(d) notice rests on a misperception or mischaracterization of the Second Circuit's holding. This case does not create such a split.

It is true that a number of circuits have viewed reliance on inaccurate *factual* or *clerical* information received in an official communication from a district court clerk's office as sufficient to excuse the untimely filing of a notice of appeal. Every case cited by the petitioners deals with information of that nature.[3] Contrary to the petitioners' suggestion, however, the court below did not reject this view. In fact, it indicated that, were those circumstances presented,

3. *See Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999) (clerk's failure to enter judgment on the court's "officially" sanctioned PACER electronic docketing system); *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981 (5th Cir. 1992) (order denying Rule 59 motion stamped with the wrong entry date); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500 (9th Cir. 1986) (clerk whited-out original docket date and inserted later docket date); *West v. United States*, 222 F.2d 774 (D.C. Cir. 1954) (prisoner pursuing *in forma pauperis* representation reasonably understood date on clerk's letter advising of denial of motion to be date of denial); *Neu Cheese Co. v. FDIC*, 825 F.2d 1270 (8th Cir. 1987) (clerk agreed to file premature notice at the time it was proper, and did so; timely filing accomplished through agency of the clerk).

it might consider such an approach (Petition Appendix ("Pet. App.") at A12):

> Although it may appear at first blush that the Tenth and Eleventh Circuits have applied the unique circumstances doctrine to allow appeals to proceed in similar situations, those cases are distinguishable because the assurances received from the clerk's offices related to truly clerical matters falling within the direct responsibility of those offices. *See Woods v. WalMart*, 124 F.3d 219, 1997 WL 527668, at *2 (10th Cir. 1997) (unpublished) (statement by clerk's office personnel regarding whether a particular judgment had been entered); *Willis v. Newsome*, 747 F.2d 605, 606 (11th Cir. 1984) (assurances about clerk's office's "local custom" and practice for stamping notices of appeal).

Here, in contrast, there is no dispute that the petitioners received accurate, timely clerical information as to when the Judgment and the Amended Judgment were entered on the docket, and as to the basis for the entry of the Amended Judgment, *i.e.*, "to correct clerical error." Opp. App. C at 5a.

What the petitioners argue here is that the Rule 77(d) notice accompanying the Amended Judgment misled them as to a *legal* issue — when they were required to file a notice of appeal. In his affidavit to the Second Circuit, the petitioners' trial counsel stated that, based on the statement in the second notice that an appeal had to be filed within 30 days and his own assessment of the nature of the amendment, he concluded that the petitioners' time to appeal the merits

of the initial Judgment had been restarted. Opp. App. D at 7a.[4] From that conclusion — a legal conclusion flatly at odds with this Court's holding in *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952) — he reasoned that if the petitioners' time to appeal had been restarted, their time to file a Rule 59 motion must have been restarted as well.[5]

The Second Circuit found *that* purported reliance — reliance not on factual or clerical information contained in a Rule 77(d) notice, but on what the petitioners' counsel took as legal advice from the clerk, which he then filtered through

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4. The significance of the petitioners' counsel having made an independent assessment of the "nature of the change" is that, quite apart from any purported reliance on legal advice from the clerk's office, he mistakenly concluded that the change represented a substantive amendment of the Judgment which restarted the petitioners' time to file their notice of appeal. The petitioners, in fact, argued that position below. Pet. App. at A8-9. The Second Circuit found that argument meritless in view of (1) the docket's express statement that the Judgment had been amended to correct a "clerical error," (2) the express terms of the district court's order for entry of final judgment, and (3) the monetary award reflected in the Judgment. Pet. App. at A3, A9-10. The petitioners do not attempt to reargue their position here and appear to have abandoned it.

5. The petitioners' counsel apparently did not consider the possibility that the second Rule 77(d) notice conveyed the accurate (if non-clerical) information that the petitioners had 30 days in which to appeal the issues appealable as the result of the entry of the Amended Judgment, *i.e.* the propriety of the clerical correction, *see, e.g.*, *American Federation of Grain Millers v. Cargill, Inc.*, 15 F.3d 726, 727-28 (7th Cir. 1994) (appeal of an order granting Rule 60(a) relief does not implicate the issues involved in the underlying judgment), rather than the plainly inaccurate legal conclusion that the petitioners' time to appeal the merits of the underlying Judgment had been restarted.

his own independent legal analysis — insufficient to excuse the filing of an untimely appeal. Pet. App. at A11. We know of no circuit that has reached a contrary conclusion.

Finally, the petitioners cite two decisions of this Court to suggest that the issue they tender is worthy of consideration. Neither is apposite. This Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), provided guidance regarding application of the "excusable neglect" standard imposed by Rule 9006 of the Federal Rules of Bankruptcy Procedure. It is simply not applicable to the "mandatory and jurisdictional" filing requirement imposed by Fed. R. App. P. 4(a)(1). *See Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257 (1978).[6]

The petitioners' citation of *United States v. Ibarra*, 502 U.S. 1, 7 (1991), for the proposition that "[l]itigants should not 'be required to guess at their peril the date on which the time to appeal commences to run' " (Pet. at 7) is also off the mark. The teaching of *Ibarra* is that certainty is promoted by adhering to general rules, not by creating nebulous exceptions. 502 U.S. at 7. Moreover, the petitioners here were not required to guess when their notice of appeal was due. First, their counsel was accurately and timely advised of the dates on which the original and amended judgments were entered and of the reason for the amendment of the judgment. In those circumstances, the rulings of this Court were clear as to the time within which the petitioners could file their notice of appeal of the underlying judgment. *FTC v.*

6. There is an express avenue by which a failure to file a timely notice of appeal owing to "excusable neglect" can be pursued for a certain period before the district court. Fed. R. App. P. 4(a)(5). The petitioners here did not pursue it.

Minneapolis-Honeywell Co. Second, if they had any doubt, the petitioners could have sought guidance from the district judge. *See In Re Slimick*, 928 F.2d 304, 310 (9th Cir. 1990) ("If a party believes a court has acted ambiguously as to an appeal deadline, it bears the burden of seeking clarification"). Third, the petitioners learned on December 17, 1997 that their Rule 59 motion had been denied. Pet. at 2-3. Even under the most unfavorable interpretation of events, their notice of appeal of the underlying Judgment was not due until December 29, 1997. They could simply have filed their notice any time during those 12 days.

In sum, none of the cases cited by the petitioners addresses purported reliance by a lawyer on a legal conclusion contained in a Rule 77(d) notice, much less a legal conclusion which the lawyer then subjected to his own independent analysis. That was the issue before the court below. Its decision creates no split in the circuits and does not warrant this Court's consideration.

2. This Case Does Not Present A Split In the Circuits On Whether Reliance On A Misleading Rule 77(d) Notice Constitutes "Unique Circumstances."

This issue is, in essence, the same issue raised in Question 1.[7] It does not warrant the Court's consideration for the same reasons discussed above.

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7. The issue whether a litigant can rely on a Rule 77(d) notice, which is the focus of Question 1, arises only if the information contained in the notice is "incorrect or misleading," the focus of Question 2. Moreover, the principal circuit court cases relied on by the petitioners in their discussion of Question 1 — *Hollins* and *Prudential-Bache* — are cases decided under the "unique (Cont'd)

No case cited by the petitioners — and no case of which we are aware — has found the "unique circumstances" standard met where a lawyer, fully informed of the facts which determine his client's time to appeal, purportedly relied on misleading (or misunderstood) legal advice from a clerk's office together with the lawyer's own mistaken legal assessment. Indeed, in *Pinion v. Dow Chemical*, 928 F.2d 1522, 1533 (11th Cir. 1991), the court stated (*quoting Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3d Cir. 1990)):

> The unique circumstances doctrine has never been extended to an attorney's miscalculation of the applicable time limits, and we see no reason to do so here even if the trial judge also shared that incorrect assumption.

The Eleventh Circuit's opinion in *Hollins*, on which the petitioners rely, is based on *Pinion*. Moreover, numerous cases, including this Court's decision in *Osterneck* itself, make clear that "unique circumstances" will not be found where counsel fails to "seek assurance" from the court in the face of ambiguous information. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989); *Pinion*, 928 F.2d at 1533. Again, no case cited by the petitioners is to the contrary.[8]

(Cont'd)
circumstances" doctrine. The others preceded this Court's decision in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which redefined the "unique circumstances" standard. Indeed, in the conclusion to their petition, the petitioners request review only of Question 1 and Question 3.

8. The petitioners suggest that it is somehow helpful to their cause that the *respondents* "made no complaint to the clerk or to the (Cont'd)

Moreover, the "specific assurance" element of the "unique circumstances" doctrine imposes a high and fundamentally fact-driven standard. Here, the Second Circuit concluded that none of the facts upon which the petitioners relied — the wording of the second Rule 77(d) notice, the District Judge's denial of the petitioners' Rule 59 motion without elaboration, and a deputy clerk's purported statement that the judge viewed the petitioners' Rule 59 motion as timely — met that standard, alone or in the aggregate. Again, the Second Circuit did not hold that no action by a district court clerk's office could ever constitute the "specific assurance" required under the doctrine — it held that *these* actions did not (Pet. App. at A12):

> Here, the assurances appellants maintain they received deal not with clerical matters, but with the substance of the order itself and the basis for the district court's decision on the motion for a new trial. The clerk's office of course might not accurately interpret a judge's order, and parties should not rely on such sources to construe an order. As a consequence, appellants fail to satisfy the requirements to establish unique circumstances to excuse their untimely filing of this appeal.[9]

(Cont'd)
District Judge that the second Rule 77(d) notice was erroneous." Pet. at 8. The respondents did not, and do not, view any portion of the second notice as "erroneous" or misleading. A fair reading of the notice, in the context of this Court's holdings on the subject, indicated that the petitioners had 30 days from entry of the Amended Judgment to file an appeal addressing the propriety of the amendment. Moreover, it was the petitioners' responsibility to determine when their notice of appeal was due, not the respondents'.

9. In discussing the petitioners' claim that they received purported oral assurances from a deputy clerk, the court below stated (Cont'd)

In short, while the clerk may be the "ultimate authority regarding entries on the court's docket," Pet. at 8, quoting *Research Equity Fund, Inc. v. Insurance Co. of North America*, 597 F.2d 1266, 1267 (9th Cir. 1979), the clerk is not the ultimate authority regarding appellate procedural law. That is counsel's responsibility. The petitioners cite no case holding that a lawyer may rely on a district court clerk's purported legal advice — particularly advice which the lawyer then subjects to his own independent analysis. That was the issue before the court below. Its decision that those facts do not satisfy the "unique circumstances" doctrine does not create a split in the circuits and does not warrant this Court's consideration.

3. The Question Whether The "Law Of The Case" Doctrine Applies To Jurisdictional Determinations Of Circuit Courts Is Not Properly Presented Here, And This Case Does Not Merit This Court's Review.

The petitioners' final "question presented" — whether the "law of the case" doctrine applies to jurisdictional determinations of circuit courts — also does not merit this Court's review. Like the other issues raised by the petitioners, this question is not truly "presented" by the lower court's decision. Contrary to the petitioners' suggestion, the Second Circuit did not base its refusal to apply the law of the case

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(Cont'd)
that such statements are not "official judicial assurances that qualify as unique circumstances." Pet. App. at A11. The petitioners themselves appear to concede the wisdom of that position with respect to alleged oral assurances. Pet. at 5-6. Nonetheless, the Second Circuit, as quoted above, ultimately distinguished, rather than rejected, the decisions of other circuits taking a contrary position. Pet. App. at A11.

doctrine on the ground that the ruling at issue was "jurisdictional." Rather, the court found reexamination of the motions panel's decision proper primarily because the discretionary doctrine of law of the case does not necessarily bind an appellate court even as to a final order, and is "even less binding" in the context of an interlocutory order issued by a motions panel. Pet. App. at A6.

The alleged "circuit split" cited by the petitioners is thus irrelevant here. Regardless of whether an appellate court may reconsider a merits panel's decision on the ground that the question at issue is "jurisdictional," the rule that a merits panel may properly revisit an interlocutory determination by a motions panel is widely accepted among the circuits. Moreover, even were the circuits to differ on this issue, it would not merit this Court's review. Not only is the law of the case doctrine discretionary — and thus subject to differences in application — but the degree of deference to be accorded to motions panel decisions by merits panels of a particular circuit is a matter of intra-circuit housekeeping. Variations among the circuits in the allocation of authority between motions and merits panels, like inter-circuit differences in the role of motions panels generally, present no occasion for this Court's review.

A. The Petitioners Ignore The Primary Bases For The Second Circuit's Decision.

The petitioners' "question presented" focuses on whether "the law of the case applies to the jurisdictional determinations of a panel of a Circuit Court." Pet. at 9. This question simply ignores the merits panel's primary justifications for revisiting the motions panel's decision regarding jurisdiction (Pet. App. at A6-7):

> First, . . . the law of the case doctrine is discretionary, not mandatory. The doctrine expresses, in shorthand fashion, a practice of the courts generally not to reconsider that which has already been decided. But it does not purport to be a legally binding limitation on the court's authority to reconsider such matters. Second, a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties, which may result in a less than thorough exploration of the issues.

Thus, the Second Circuit's reexamination of the motions panel's decision was based on its view that "[b]ecause law of the case doesn't bind an appellate court even as to final orders, it follows that the doctrine is even less binding in the context of interlocutory [motions panel] orders." *Id.* at A6. The jurisdictional nature of the disputed issue, the court observed, only rendered reexamination "especially important." *Id.* at A7.

As a result, the petitioners' "question presented" regarding law of the case does not merit review in the context of this petition. The ruling of the court below was that the doctrine of law of the case does not bar merits panel review of an interlocutory decision by a motions panel. The petitioners' "question presented" does not even address that ruling.

B. The "Circuit Split" Cited By The Petitioners Is Irrelevant, And No Split Exists On The Relevant Issue.

The petitioners' contention that "the Circuit courts are divided over the question of whether the law of the case

applies to the jurisdictional determinations of a panel of a Circuit Court" (Pet. at 9) is irrelevant here. No significant split exists as to the question actually decided by the Second Circuit: whether a merits panel may properly review the holding of a motions panel.

Indeed, decisions of two circuits cited by the petitioners as creating the alleged "split" were properly cited by the Second Circuit in support of its decision. In *Stifel, Nicolaus & Co., Inc., v. Woolsey & Co., Inc.*, 81 F.3d 1540 (10th Cir. 1996), the Tenth Circuit expressly held that "an appeals court may review a prior motions panel's decision uninhibited by the law of the case doctrine." *Id.* at 1544 (citing cases).[10] Similarly, in *McCuen v. American Casualty Co.*, 946 F.2d 1401, 1403 (8th Cir. 1991), a case cited by the petitioners, the Eighth Circuit observed that it was "not to be doubted" that the court had the power, at the merits stage of the case, to "re-examine" its earlier ruling on a motion to dismiss. These circuits thus follow the same rule the Second Circuit did here.

The petitioners also claim that the decision below is inconsistent with the law of the D.C. Circuit. In doing so, however, the petitioners simply ignore the vast weight of D.C. Circuit authority to the contrary. *See, e.g., Asarco, Inc. v. FERC*, 777 F.2d 764, 773 n.6 (D.C. Cir. 1985) ("The disposition of a motions panel may of course be reexamined

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10. *Wilmer v. Board of County Comm'rs*, 69 F.3d 406 (10th Cir. 1995), the Tenth Circuit decision upon which the petitioners rely, is not to the contrary. It discussed the propriety of reconsidering an earlier *merits* (not *motions*) panel decision, and held only that it need not definitively decide that question because the disputed issue had not been "actually resolved on the merits" by the earlier decision.

during the merits panel's in-depth consideration of the case."); *American Methyl Corp. v. EPA*, 749 F.2d 826, 832 (D.C. Cir. 1984) ("There is no theoretical obstacle to our reconsidering the motions panel decision. . . ."); *Northwest Airlines, Inc. v. FAA*, 675 F.2d 1303, 1308 (D.C. Cir. 1982) (reversing a motions panel's decision); *Association of Investment Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982) (declining to apply law of the case as a bar to reexamining a motions panel decision because "[m]otion papers frequently do not reveal the full dimensions of the question tendered"). The petitioners instead focus on a lone D.C. Circuit case suggesting — in an unilluminating one-paragraph discussion — that the decision of a motions panel of the court is "preclusive for all matters decided expressly or by necessary implication." *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997).[11] To the extent that *Taylor* — which, like the petitioners, simply ignored settled circuit law to the contrary — creates any uncertainty regarding the D.C. Circuit's rule governing merits panel reconsideration of motions panel rulings, that uncertainty should be resolved in the first instance by the circuit court itself, not by this Court on a petition for review of a decision from another circuit.

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11. The petitioners also cite the D.C. Circuit's decision in *LaShawn v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996), but that decision is irrelevant here because it concerns the preclusive effect of a decision by "an earlier [merits] panel in an earlier appeal of the same case," rather than the significance of a motions panel decision.

C. Even If The Circuits Differed In Applying The Law Of The Case Doctrine To Motions Panel Decisions, The Decision Below Would Not Warrant This Court's Review.

Even if there were differences among the circuits on the question of whether a merits panel may properly reexamine an interlocutory ruling of a motions panel, that issue would not merit this Court's review. As the Second Circuit has observed, the law of the case doctrine is "discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." *DiLaura v. Power Authority of New York*, 982 F.2d 73, 76 (2d Cir. 1992); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power") (Holmes, J.). In light of the doctrine's discretionary nature, variations in its application are to be expected, and certainly do not require this Court's review.

Moreover, defining the role of motions panels within a particular circuit is a task for the circuit itself. No federal statute or rule requires the use of motions panels, or establishes the contours of their authority; such matters are generally governed by the circuits' "internal operating procedures." *See, e.g.*, U.S. Ct. Of App. 7th Cir. App. III, IOP 1 (establishing that a panel of two judges may act on certain matters, such as requests for bail, while a panel of three judges is required to dismiss a case on the merits, and all other motions may be entertained by a single judge). A circuit would thus presumably be free to expressly authorize merits panels to review all motions panel decisions, or to expressly prohibit any such review, or, for that matter, to eliminate the use of motions panels altogether. Variations

among the circuits in their treatment of such procedural matters, like variations in circuit rules of procedure generally, do not warrant this Court's review.

D. The Petitioners' Additional Arguments In Favor Of Review Are Meritless.

Finally, the petitioners argue that this Court should grant review because the lower court's decision was "ill-advised" for four reasons. Quite apart from the fact that being "ill-advised" would fall far short of rendering a circuit court decision worthy of certiorari review, the petitioners' arguments are simply meritless.

First, there is no reason to believe that the Second Circuit's reversal of the motions panel decision resulted from the fact that "three different judges [were] sitting." Pet. at 9. Rather, as the court below explained, "a motions panel's decision is based on an abbreviated record and made without the benefit of full briefing by the parties." Pet. App. at A7. "With the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered." *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 (5th Cir. 1983). That is precisely what happened in this case.

Second, the petitioners' contention that the "procedure followed by the Second Circuit . . . ignore[d] the printed rules of that court," Pet. at 10, is both wrong and irrelevant. It is wrong because Second Circuit Local Rule 27(i) does not prohibit merits panel review of a motions panel decision; it simply states that a party may not request in banc consideration of a motion unless the motion has been ruled

on by a panel of the court. Pet. App. at A23. The petitioners' claim is irrelevant because the question whether a circuit court panel properly followed circuit court rules is a matter to be policed by the circuit itself, not by this Court. Here, not a single judge of the Second Circuit found merit in the petitioners' claim that Rule 27(i) had been contravened, as indicated by the fact that not a single judge requested a vote with respect to in banc review. Pet. App. at A15.

Third, the petitioners maintain that the merits panel's reexamination of the motions panel's decision imposed an "unfair and costly burden on the litigants because it requires them to incur considerable attorneys fees and printing costs to brief the case on the merits." Pet. at 10. However, the petitioners' fees and costs to prepare and print their brief on the merits would have been the same had there been no prior motion and the jurisdictional issue had been raised, as it often is, for the first time before the merits panel. The merits panel would nonetheless have dismissed for lack of jurisdiction.[12] As to any perceived "unfairness," there can be no question that it would be far more "unfair" (not to mention unlawful) for circuit courts to permit cases over which they have no jurisdiction to proceed than it would be to reexamine erroneous motions panel rulings.

Finally, the petitioners' argument that the Second Circuit's rule that a merits panel may review the decision of a motions panel could lead to "constant conflicts within the circuit" is misdirected. Like the petitioners' concern

12. Moreover, the petitioners' briefing of the jurisdictional issue at the motions stage was expressly incorporated by reference into their merits reply brief (Appellants' Reply Brief at 24), thus both utilizing the arguments they had developed at the motions stage and rendering the preparation of the merits brief more economical.

regarding Second Circuit Rule 27(i), this is an argument properly directed to the Second Circuit in banc, not to this Court. Once again, then, it is significant that not a single Second Circuit judge voted to hear the petitioners' claim in banc.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER J. KLARFELD
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TIMOTHY J. SIMEONE
WILEY, REIN & FIELDING
Attorneys for Respondents
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Dated: January 28, 2000

APPENDIX

APPENDIX A — NOTICE TO LITIGANTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT DATED NOVEMBER 26, 1997

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

RICHARD PAUL WASKO
CLERK

* * *

Date 11/26/97

Civil Action No. 1:94-cv-60 and 1:94-cv-116

REZZONICO vs. H&R BLOCK

NOTICE TO LITIGANTS

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure as it reads in part . . . "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days [60 days if the United States, an officer or an agency is a party] after the date of entry of the judgment or order appealed from."

Appendix A

PLEASE TAKE NOTICE

1. Judgment or Order filed — November 25, 1997

2. Date of Entry of Judgment or or Order on the docket of this court — November 26, 1997

3. Notice of Appeal MUST be filed on or before — December 29, 1997

s/ [illegible]
Deputy Clerk

APPENDIX B — NOTICE TO LITIGANTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT DATED DECEMBER 1, 1997

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

RICHARD PAUL WASKO
CLERK

* * *

Date December 1, 1997

Civil Action No. 94-cv-60 & 116

REZZONICO vs. H&R BLOCK

NOTICE TO LITIGANTS

Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure as it reads in part . . . "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days [60 days if the United States, an officer or an agency is a party] after the date of entry of the judgment or order appealed from."

Appendix B

PLEASE TAKE NOTICE

1. Judgment or Order filed — December 1, 1997

2. Date of Entry of Judgment or or Order on the docket of this court — December 1, 1997

3. Notice of Appeal MUST be filed on or before — December 30, 1997

s/ [illegible]
Deputy Clerk

APPENDIX C — EXCERPTS OF DOCKET ENTRIES

Proceedings include all events.
1:94cv60 Rezzonico, et al v. H & R Block, Inc., et al

REFER APPE
CLOSED LEAD
RUTLND

* * *

11/21/97 151 ORDER granting [139-1] motion for entry of final judgment (Chief Judge J. G. Murtha) Cy to parties (wjf)

11/26/97 152 MOTION with memorandum in support by plaintiff Jacquelyn Rezzonico, plaintiff John Rezzonico for a Stay of Non-Compete Injunction during the 10 day post-judgment period and pending appeal (amn)

11/26/97 153 JUDGMENT (Chief Judge J. G. Murtha) for H&R Block Eastern, H & R Block, Inc. against Jacquelyn Rezzonico, John Rezzonico for $750,142 at 5.42% interest plus injunctive relief, case closed Cy to parties Notice to Litigants — Appeal to be filed by 12/29/97. Exhibits returned to parties. (wjf)

11/26/97 — File sent to Brattleboro (Last file folder only) (wjf)

12/1/97 154 AMENDED JUDGMENT (Chief Judge J. G. Murtha) for HRB Royalty, Inc., H&R Block Eastern, H & R Block, Inc. against Rezzonico, John Rezzonico to correct clerical error. Notice to Litigants — Appeal to be filed by 12/30/97. Cy to parties (wjf)

* * * * .

APPENDIX D — AFFIDAVIT OF PETER WELCH DATED MARCH 2, 1998

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

Docket No. 98-7060

JOHN REZZONICO AND JACQUELYN REZZONICO

Appellants

– against –

H&R BLOCK, INC., AND H&R BLOCK
EASTERN TAX SERVICES, INC.

Appellees

AFFIDAVIT OF PETER WELCH

PETER WELCH, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law in the State of Vermont and I make this affidavit at the request of Norman A. Olch, the attorney for the appellants in this Court.

2. My law firm, Welch, Graham and Manby, and I represented the appellants in this matter in the United States District Court for the District of Vermont.

3. Shortly after November 26, 1997 I received from the Clerk of the District Court written notice pursuant to F.R.C.P. 77(d) informing me that the judgment had been entered and

that pursuant to F.R.A.P. 4(a)(1) the Notice of Appeal had to be filed within 30 days or by December 29, 1997. (Appellee Ex. 4). A copy of the judgment was attached to the notice.

4. Shortly thereafter I received from the Clerk of the Court a copy of the Amended Judgment, together with a Rule 77(d) notice, informing me that the judgment had been entered December 1, 1997 and that I had to file the Notice of Appeal by December 30, 1997. (Appellee Ex. 6).

5. I was also aware that in the Amended Judgment the court inserted and underscored the word "not". (Appellee Ex. 5, p. 3, ¶2).

6. Based on the second Rule 77(d) notice, and on the nature of the change made in the Amended Judgment, on December 15, 1997 I filed a Motion for a New Trial pursuant to F.R.C.P. 59. Excluding intervening Saturdays and Sundays, *see* F.R.C.P. 6(a), the motion was filed within 10 days of the December 1, 1997 entry of the Amended Judgment as required by Rule 59(b). That same day I filed a Motion for Reconsideration of a prior order of the court.

7. On December 17, 1997 an order was entered denying the Rule 59 motion, and on January 13, 1998 I filed a Notice of Appeal. This filing was within 30 days of the entry of the order denying the Rule 59 motion. *See*, F.R.A.P. 4(a)4(E).

8. On or about December 17, 1997 I had a conversation with my associate, Maureen Regan, in which she stated that a deputy clerk of the District Court had assured her that while

the District Judge had denied my Motion for Reconsideration as "untimely", the judge considered the Rule 59 motion timely and had denied it on the merits.

9. At no time while this matter was pending in the District Court did I receive any communication or notification from the District Judge, from the clerk of the court, or from opposing counsel that the Rule 59 motion was untimely or that I should otherwise disregard the Rule 77(d) notice informing me that the time to appeal was now measured from the entry of the Amended Judgment on December 1, 1997. If I had received any such communication I would have filed the Notice of Appeal within 30 days of the November 26, 1997 entry of the original judgment.

Dated at Hartford, VT this 2nd day of March, 1998.

s/ Peter F. Welch
Peter F. Welch

STATE OF VERMONT
WINDSOR COUNTY, SS.

Subscribed and sworn to before me this 2nd day of March, 1998.

s/ [illegible]
Notary Public
My Commission Expires: 2/10/99
Please Affix Seal